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OFFICE OF PETITIONS

In re Application of :
Ledbetter, et al. :
Application No. 10/627,556 : ON PETITION
Filed: July 26, 2003 :
Attorney Docket No. 49076.000004.CIP2 :

This is a decision on the petition under 37 CFR 1.183 to waive the requirements of 37 CFR 1.10 filed, June 28, 2004.

The petition is **dismissed**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition" under 37 CFR 1.10."

The instant petition was filed to correct what petitioner believes is an incorrect filing date accorded the above-cited application. Petitioner maintains that the correct filing date for the application should be July 25, 2003, not the currently accorded date of July 26, 2003. In support thereof, petitioner filed declarations from several persons corroborating the facts detailed in the instant petition. Petitioner is requesting that the requirements of 37 C.F.R. 1.10 be waived because petitioner was presented with extraordinary circumstances that prevented the deposit of the patent application with the United States Postal Service before the last scheduled pick-up on July 25, 2003, and because justice requires such waiver in this instance.

Petitioner's request cannot be granted based on the facts presented. The reasons petitioner's arguments must fail are addressed below.

In this instance, petitioner is actually requesting waiver of a statutory requirement, not simply the requirements of a rule, insofar as petitioner is requesting a date other than the date the application was actually deposited with the United States Postal Service. Section 1.10(a) of Title 37 of the Code of Federal Regulations dictates that, "[a]ny correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS." This indication of 37 C.F.R. 1.10(a) is based in statute, specifically 35 U.S.C. 21(a) that provides that, "[t]he Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark office will be considered filed in the Office on the date on which it was deposited with United States

Postal Service or would have been deposited with the United States Postal Service but for postal interruptions or emergencies designated by the Director.” In order to accord the subject application a filing date of July 25, 2003, the Commissioner would have to suspend the requirement implicit in 35 U.S.C. 21(a) that the filing date accorded an application be the date the application was actually deposited with the United States Postal Service in favor of the date the application was intended to be deposited. Petitioner is aware that 37 CFR 1.183 only authorizes suspension or waiver of requirements of rules that are not also requirements of the statutes. In this case, suspension of the requirement that the filing date accorded the application be the date the application was deposited with the United States Postal Service is not possible as this is a requirement of 35 U.S.C. 21(a).

It is also noted that petitioner makes an effort to explain that ordinary care and diligence were exercised in the preparation of the patent application such that justice would require suspension of the requirements under 37 C.F.R. 1.10. Petitioner’s efforts are noted, however, petitioner failed to mention that petitioner waited until nearly midnight on the last day the application could be deposited with the USPS to satisfy petitioner’s requirements relative to the PCT application. Arguably, this may be considered a lack of the exercise of the reasonable care and diligence given the deadline under which petitioner was operating, and, therefore, not an extraordinary circumstance warranting waiver of the rules. *See Vincent v. Mossinghoff*, 230 USPQ 621 (D.D.C. 1985). Further, it may be argued that petitioner’s unawareness of the new post office hours, and consequential failure to deposit the application with the USPS before the last scheduled pick-up, while unfortunate, is not an extraordinary situation that would warrant waiver of the requirements of 37 C.F.R. 1.10. *See also MPEP* 513.

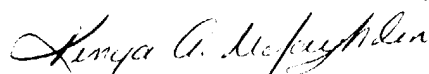
Based on the aforementioned, the instant petition under 37 C.F.R. 183 to waive the requirements of 37 C.F.R. 1.10 is dismissed. Petitioner is advised that the undersigned consulted with the Office of Patent Legal Administration prior to authoring this decision.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 Box 1450
 Alexandria, VA 22313-1450

By facsimile: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 305-0010.



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Office of Petitions